



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 25, 2022

IN THE MATTER OF:

Appeal Board No. 622501

PRESENT: GERALDINE A. REILLY, MEMBER

In Appeal Board Nos. 622501, 622502, and 622503, the claimant appeals from the decisions of the Administrative Law Judge filed March 16, 2022, which sustained the initial determinations holding the claimant ineligible to receive benefits, effective beginning November 18, 2019 and ending March 15, 2020, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$6,804 in benefits recoverable pursuant to Labor Law § 597 (4); and reducing the claimant's right to receive future

benefits by 136 effective days and charging a civil penalty of \$1,020.60 on the basis that the claimant made willful misrepresentations to obtain benefits.

At the combined telephone conference hearings before the Administrative Law Judge, including a hearing held pursuant to remand orders of the Appeal Board (Appeal Board Nos. 618102, 618103, and 618104), all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was separated from employment under circumstances not at issue, and filed a claim for unemployment benefits using the internet on November 15, 2019.

In late November 2019, the claimant began to work for a wholesale supermarket, stocking shelves. The claimant worked overnight shifts, one or two days a week, from 11:00 P.M. to 7:00 A.M. At hire, the claimant's hourly pay rate was

\$12.50, but at some point that was increased to \$14.00 per hour. The claimant did not work the same two days each week; the days he worked varied, and were set by the employer. If the claimant worked one day, he worked 7 or 8 hours; if he worked two days he worked 14 to 16 hours a week. The claimant's weekly take-home pay was never more than \$150 or \$200.

After he began working this overnight shift, beginning with the week ending November 24, 2019 and through the week ending March 15, 2020, the claimant certified weekly for unemployment benefits, at times using the telephone and at times over the Internet. Each week when the claimant certified, he was asked whether he had worked the previous week, and if so, how many days. Each week, the claimant responded that he had worked, and accurately reported the number of days he had worked during the previous week, indicating that he had worked one or two days each week, depending upon that week's schedule. The record of the claimant's certifications for the week ending November 17, 2019 through the week ending March 15, 2020, reflect that each week the claimant responded that he worked "0" days.

The initial determinations at issue were mailed to the claimant on June 3, 2021.

OPINION: Labor Law §597(3) provides that, "Any determination regarding a

benefit claim may, in the absence of fraud or wilful misrepresentation, be reviewed only within one year from the date it is issued because of new or corrected information."

In this case, the ineligibility based upon the claimant's lack of total unemployment, recoverable overpayment, and wilful misrepresentation determinations cover the period beginning in November 2019 and ending March 15, 2020, yet the initial determinations was not issued until June 3, 2021. Since the determinations were issued more than one year after the initial finding of eligibility and the payment of benefits to the claimant, the Labor Law requires a finding that the claimant made wilful misrepresentations that resulted in the payment of benefits to him, for the Department of Labor to have authority to issue the determinations, and for the merits to be reached by the hearing Judge and the Board. The credible evidence in this record fails to establish that the claimant made wilful misrepresentations when certifying for benefits for the weeks at issue.

Rather, the claimant's firsthand credible testimony establishes that he accurately reported the number of days he worked each time he certified for benefits, and that the record of his certifications presented by the Department is not accurate. We note that the claimant's testimony has been consistent and unwavering throughout the course of the two hearings held in this matter, and as the only firsthand, credible testimony presented, is accepted over the hearsay record of certifications document.

We find it significant that although the Commissioner of Labor was represented at the hearing following the Board's remand, the representative failed to establish that the record of certifications was a business record kept by the Department of Labor in the ordinary course of its business, or to otherwise authenticate the document used as a basis for holding that the claimant made false statements and wilful misrepresentations when certifying. Therefore, the claimant's credible consistent firsthand testimony is given greater weight than the unauthenticated hearsay document. See, generally, Appeal Board No. 551204.

Since the credible and consistent evidence establishes that the claimant worked either one or two days during the weeks at issue, and that the claimant accurately reported these days worked when he certified weekly for unemployment benefits, we find that his certifications were not wilful misrepresentations, and conclude that the Commissioner of Labor had no authority to issue the determinations in this case.

DECISION: In Appeal Board Nos. 622501, 622502, and 622503, the decisions of the Administrative Law Judge are reversed.

In Appeal Board Nos. 622501, 622502, and 622503, the initial determinations holding the claimant ineligible to receive benefits, effective beginning November 18, 2019 and ending March 15, 2020, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$6,804 in benefits recoverable pursuant to Labor Law § 597 (4); and reducing

the claimant's right to receive future benefits by 136 effective days and charging a civil penalty of \$1,020.60 on the basis that the claimant made willful misrepresentations to obtain benefits, are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

GERALDINE A. REILLY, MEMBER